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THE CONSTITUTIONALITY OF THE ACT OF LEGISLATURE KNOWN AS THE OPTIONAL CHARTER ACT.

The late amendment to Section 117 of the Constitution of Virginia reads as follows:

"Notwithstanding, however, anything in this article contained, the General Assembly may, by general or by special act (passed as prescribed in Article Four of this Constitution), depart in any respect (except otherwise in this section expressly provided) from the form of organization and government prescribed by this article for cities and towns, and may provide from time to time for the various cities and towns of the Commonwealth, such forms or forms of municipal government as the General Assembly may deem best; but no form or forms of government authorized by the second paragraph of this section shall become operative except as to such cities or towns as may thereafter adopt the same by a majority vote of its qualified electors at an election to be held as may be prescribed therefor by law. All the limitations on the powers of the councils of cities and towns imposed by this article shall apply in like manner to the principal legislative authority under any form of government which may be authorized hereunder. The term "council," as used in sections one hundred and twenty-five and one hundred and twenty-seven of this Constitution, shall be construed to include the body which, under any form of municipal government, shall be vested with the principal legislative authority of such municipality.

The General Assembly, for the purpose of this article, may classify cities according to their population, but the maximum population prescribed for any class shall exceed the minimum for the same class by at least ten thousand. The General Assembly, at the request, made in manner which may be prescribed by law, of any city having a population of over fifty thousand inhabitants, may grant a special form of government for such city.

Any laws or charters enacted pursuant to the provisions of this section shall be subject to the provisions of this

> Constitution relating expressly to judges and clerks of courts, attorneys for the Commonwealth, commissioners of revenue, city treasurers and city sergeants."

This constitutional amendment was drawn and passed two Legislatures and a popular vote of the State, largely through the efforts of an association of Virginia cities, known as the Virginia League of Municipalities. The active members of the committee who drafted the amendment were Robert B. Tunstall, of Norfolk, Virginia, A. C. Braxton, of Richmond, Virginia, A. R. Long, of Lynchburg, Virginia, and J. A. Massie, City Attorney, of Newport News, Virginia.

At the Legislature following the passage of the constitutional amendment, for the purpose of putting that amendment into effect, the League of Virginia Municipalities succeeded in having prepared and having passed, by the Legislature, an act known as the Optional Charter Act. This act, in its original form, was drawn by W. C. L. Taliaferro, City Attorney of Hampton, Virginia, at the request of the undersigned, then acting as President of the League of Virginia Municipalities. The act, in its original form, was referred by the League to two committees, composed mainly of leading attorneys in various parts of the State, and after much consideration and some amendments, met with the approval of the League and was passed by the Legislature substantially as recommended, except that the number of petitioners required to inaugurate a change was increased from fifteen per cent (15%) to twenty-five per cent (25%) of the qualified voters. The act provides that the qualified voters of a city or town may, by a petition, select between certain forms of municipal government, specified in the act to be set forth in the petition, and certain variations in those forms specified in the act and to be set forth in the petition. The petition is then voted on, and if carried by a majority of the qualified electors of the city or town, constitutes a complete act or section of an act. The petition is an optional charter to the city.

It is to be observed that the Legislature here had a choice of two methods of procedure, which really constitute one and the same thing. The Legislature could either have prescribed a

separate form for every possible variation, or as it did, for the sake of brevity, it could have included a number of variations in one form and have allowed the selection to be made in the petition. In either event, the result is the same. The contents of the petition would be the same and the powers conferred on the city would be the same, after the election was held.

It is contended that the Optional Charter Act is void for two reasons:

(1) Because it allows the voters of the various cities in this State to select not one form, but between various forms of municipal government, by making the operation of the Statute conditioned on a popular vote.

(2) Because it allows such voters to select between certain variations of those forms specified in the act, by making the operation of the Statute conditioned on a popular vote.

It is contended that the making of the Optional Charter Act, conditional upon the vote of the citizens of the various cities, is not only not authorized by the above amendment, but is an unconstitutional delegation of legislative duties and a violation of Section 40 of Article IV of the Constitution, which prescribes that:

"The legislative power of the State shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates."

It is conceded that the Legislature may, without delegating legislative authority, submit to the voters a choice between two forms of government, the old and the new, but it is denied that the Legislature may submit to the voters a choice between the old form and two or more new forms. It is stated and denied that a law to be submitted to the voters must be complete. It is conceded that a choice between two forms, the old and the new, is a complete law, but the argument against the constitutionality of the Optional Charter Act is based on the theory that a choice between three or more forms is therefore an incomplete law, although no precedent or authority whatever is offered for this logically untenable position.

It is to be noted that both of these objections are based on

the same theory, namely, that the Legislature can not delegate a choice between more than two forms, the old and the new. It is clear that if this theory is correct and the Legislature can delegate a choice between any number of forms constituting variations of municipal government, then the Legislature can also authorize a choice not only between forms, but between variations of forms. Each variation constitutes a complete form. It is one and the same thing whether the Legislature lays down one form and says that the voters may vary this in fifty specified ways or whether the Legislature sets out in the act fifty forms each containing one of the specified variations. The result in either case is the same. It is merely a case of brevity in one instance as against prolixity in the other. For instance, the Legislature might set out a complete form and say that the voters might have three or nine councilmen, as they might specify, in the petition, or the Legislature might set out in the act eight different forms, one with three councilmen, one with four, one with five and so on. The result is the same. The result is also the same as to any other details, the variations being separate forms, and it being immaterial in results as to whether one or more forms, with minor variations, is submitted, or a large number of separate forms, with each variation making a new form.

Both of the above contentions, one and two, being based on the same general principle, will be dealt with in this brief collectively. It is also to be noted that in the brief attacking the constitutionality of the Optional Charter Act, which appeared in public print, no consideration was given to the point that the Legislature has always had a right to delegate local legislation to municipal corporations and that in the initiative and referendum Commission Government cases, this right to delegate legislation to the corporations has been held to include the right to delegate the legislation to the voters of the municipal corporations. No authorities are cited on the point.

There are four answers to the objections to the constitutionality of the Optional Charter Act.

The first is that by authorizing the Legislature to prescribe such forms as it might deem best, the amendment impliedly gave

to the Legislature the power to submit a choice between those forms and variations in forms to voters in cities as a portion of the new forms; that by authorizing the Legislature to depart "in any respect" from existing forms, this power was also given.

The second is that apart from the language of the amendment inferentially allowing the Legislature to submit the forms to vote, still by general principles of constitutional law, the Legislature has this authority, in view of the provisions of the amendment.

The third is that the authority in the amendment allowing the Legislature to prescribe an election gives the Legislature the right to prescribe the manner of the election, including a specification of what may be voted on and how it may be voted upon, in view of the provisions of the amendment.

The fourth is that the act is complete. The choice to the voters between forms and variations in forms constituting complete forms does not render the act incomplete.

It is important to preface all considerations of this question by recalling clearly the fact that it is not sufficient to raise a doubt as to the constitutionality of an act, in order to render the Statute unconstitutional. Every doubt is resolved in favor and not against the unconstitutionality of the act. The power of the Legislature is supreme, except where it is limited by the Constitution. In Moss *v.* County of Tazewell, 112 Va: 878, this doctrine is stated as follows:

> "The power of the legislature to enact laws is supreme, except so far as it is restrained by the State or federal constitution, and even in case of doubt as to the power, all doubts are to be resolved in favor of the existence of the power. Courts have no power to declare an act unconstitutional, unless it is so clearly and plainly so that there can be no doubt on the subject."

This doctrine has been reiterated in each succeeding report as follows: Norfolk County *v.* Duke, 113 Va. 94; Ex parte Settle, 114 Va. 715; Shenandoah Lime Company *v.* Governor, 115 Va. 865.

Therefore, we start absolutely assured that if the constitu-

tionality of the act is merely doubtful, the act is still perfectly constitutional.

I

DOES THE AMENDMENT TO SECTION 117 IMPLIEDLY AND INFERENTIALLY PERMIT THE LEGISLATURE TO SUBMIT TO THE VOTERS OF CITIES AND TOWNS A CHOICE BETWEEN SEVERAL FORMS OF CITY GOVERNMENT?

In considering this question, let us analyze the provisions of the amendment to § 117. This amendment to the Constitution expressly allows the Legislature:

(1) To depart in any respect from the form of organization and government prescribed in Article 8 for cities and towns that is to utterly disregard the general constitutional limitations as to organizing and governing a city or town.

(2) To provide from time to time for the *various* cities and towns of the Commonwealth such form or forms of municipal government as the General Assembly may deem best. Note carefully the expression form or forms, not merely form.

(3) It expressly provides that no form or forms shall become operative, except as to such cities and towns as may adopt the same by a majority vote of its qualified electors.

(4) It authorizes, but does not require, the Legislature to classify the cities and towns, and this authority to classify is subsequent to, some distance from in the context, and not connected with or in any way dependent upon the authority to prescribe forms. The Legislature may, if it deems best, classify and prescribe but one form, leaving to some one class of cities their present form, or the Legislature may prescribe forms, without classifying. The form or forms may be prescribed for the "various cities and towns of the Commonwealth," classified or unclassified, as far as the power is concerned.

(5) The amendment does not in express terms permit or forbid the Legislature to submit a choice between several forms to the voters of the cities and towns, but it is given the Legislature the specific right to prescribe by law how the election may be held. That is, what shall be voted on and how it shall be voted on.

Bearing in mind this analysis, let us consider whether the Legislature is inferentially authorized by the amendment to submit to vote the choice of various forms of municipal government, as provided in the Optional Charter Act.

Article 8 of the Constitution prescribes the general form for the organization and government of cities and towns of the Commonwealth. By giving to the Legislature in the late amendment to Section 117, the authority "to depart in any respect" from the form of organization and government prescribed in that article, it is clear that the intent was to allow the widest scope of action to the Legislature. Except for the limitations contained in section 117, of Article 8, the whole article of twelve sections is left entirely to the discretion of the Legislature, with authority to depart from it, as to the form of organization and government of cities and towns, as the Legislature may desire.

Then in addition to this widest possible grant of authority, the Legislature is authorized to prescribe such form or forms of municipal government as it "may deem best." No broader language could be used. Any further authority is wholly unnecessary. By giving specific authority to the Legislature as to details, the authority to the Legislature as to other details might have been rendered questionable, and the amendment would have been rendered too lengthy. It was clearly thought preferable to give the Legislature a general carte blanche than to specify at some length the details of the manner in which it might depart from existing forms.

The constitutional amendment allows the creation of such new forms as the Legislature "may deem best." If the Legislature deems it best, as a portion of the form of government, to submit the form or the choice of the form to the people, the submission being deemed best by the Legislature as a portion of the new form, is clearly within the scope of the amendment.

From the three authorties given in the act, allowing the Legislature to depart "in any respect" from existing forms, to prescribe such new forms as might be deemed best, and to prescribe generally in reference to an election, for the purpose of putting into effect the new forms, the absolute discretion of the Legis-

lature in this matter is made manifest. The protection, however, from any mistake on the part of the Legislature is that a majority vote of the qualified voters is necessary, in order to put into effect a new form under the general law.

The writer was present when, after mature consideration, the constitutional amendment was framed and drawn; he was the Chairman of the committee appointed by the League of Virginia Municipalities to secure the passage of this amendment, appearing in that regard before the committee of two legislatures. He drew the act of legislature submitting the amendment of Section 117 of the Constitution to popular vote and is able to speak with knowledge of the past history of this constitutional amendment.

LEGISLATURE HAS ALWAYS HAD UNQESTIONED RIGHT TO DELEGATE LEGISLATIVE POWERS IN LOCAL MATTERS TO MUNICIPAL CORPORATIONS AND UNDER NEW AMENDMENT CAN DELEGATE THESE POWERS TO MUNICIPAL CORPORATIONS THROUGH THE VOTERS THEREOF.

Under the form of government authorized prior to the amendment of Section 117, the Councils of the various cities and towns were authorized to legislate in regard to a great extent of matters involving local government.

In Stoutenburgh *v.* Hinnick, 129 U. S. 141, this doctrine is stated thus:

> "While the rule is also fundamental that the power to make laws can not be delegated, the creation of municipalities exercising local self government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of a power to prescribe local regulations according to immemorial practice subject, of course, to the interposition of the superior in the case of necessity."

In Cooley on Constitutional Limitations, 264 (*7* Ed.) the law is stated thus:

> "It has already been seen that the legislature cannot delegate its power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of

> the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the State; and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of State policy or dangers of local abuse to warrant the interposition."

The new amendment authorizes the Legislature to depart "in any respect" from the old form and thereby inferentially authorizes the Legislature to confer this legislative power of the cities in local matters on the voters in the stead of the Council. If it was not an improper delegation of legislative authority to give this power of legislation to the city through its Councils, then it follows as an irresistable inference that the right to delegate legislative power to a city through its voters under the amendment to Section 117 is just as extensive as was the right to delegate legislative power to a city through its Council under the Constitution prior to its amendment. One was not unconstitutional. The other is not either. *The inhabitants and not the officials constitute the city.* I Dillon Municipal Corporations, Section 40, 3rd Edition.

In the absence of some prohibition in the Constitution, a Legislature has a right to delegate this power of local legislation to the voters of a municipal corporation. This result may be achieved either by allowing the voters to initiate legislation, in which case it is called "initiative," or by allowing the voters to block legislation, already initiated, in which case it is styled "referendum." In either event, the power of legislation is placed in the voters. The constitutionality of this procedure, in the absence of some prohibition, has been sustained in numerous cases—Los Angeles' case, 11 L. R. A. 1092, N. S. and cases cited. Dallas' case, 33 L. R. A. 769, N. S. The reasoning in these cases, coupled with the wide authority given in our new constitutional amendment, is strongly convincing as to the constitutionality of the Optional Charter Act.

II

CONCEDING FOR THE SAKE OF ARGUMENT THAT THE CONSTITUTIONAL AMENDMENT TO SECTION 117 IS SILENT BY INFERENCE OR OTHERWISE AS TO WHETHER THE LEGISLATURE MAY ALLOW THE VOTERS OF THE CITIES AND TOWNS OF THIS STATE TO CHOOSE BETWEEN SEVERAL FORMS OF MUNICIPAL GOVERNMENT. IS THIS SUBMISSION TO THE VOTERS ALLOWED BY GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, APART FROM THE AMENDMENT TO SECTION 117?

It is conceded that the Legislature may allow voters under general principles of constitutional law to select between two forms of municipal government, that is, between a new charter and the charter previously prescribed by the Legislature. This selection, it is admitted, constitutes no delegation to the people of legislative functions. But it is contended as the very basis of the argument against the Optional Charter Act that it is a delegation of legislative authority to allow the people to select between more than two forms of municipal government. This argument is not based either on reason, logic or on any cited authority. If it is not a delegation of legislative authority to select between two forms of government, the old and the new, no process of logical reasoning can make it a delegation of legislative authority to select between the old form of government and a dozen or more new forms.

In the case of Bank of Chenango *v.* Brown, 26 N. Y. 467, this specific point was passed on and the Court held:

> "The legislative power, in this State, is absolute and unlimited, except by the restriction of the Constitution.
>
> "The provisions in the Constitution of 1846 (art. 8, Secs. 1, 9), that corporations may be formed under general laws, and that the legislature shall provide for the organization of cities and incorporated villages, are merely directions for the exercise of an authority which had been restricted by former constitutions, and not grants of power.
>
> "The act (ch. 426 of 1847, Sec. 92), authorizing the electors of an incorporated village to *determine what sections of the general act for the incorporation of villages shall apply to their village,* is valid and constitutional. It is not the delegation of legislative power, but a tender to these

municipalities of such specified amendments to their respective charters as they may elect to accept."

This case is directly in point and is not contradicted by a single authority as to the exact point in issue.

In Cyc. 28, at page 241, the law is stated thus:

> *"Adoption of Amendment or New Charter by Municipality*—(a) In General. In some jurisdictions a general statute or constitutional provision authorizes municipal corporations generally, or corporations of a particular class, to adopt an amended or new charter in a prescribed mode, as by action of the corporate authorities or vote of the people, or both, or to come under the operation of a general municipal incorporation law or particular sections thereof; and *such a statute is not unconstitutional as a delegation of legislative powers to the municipality or its inhabitants."*

The following cases are cited: California, Hobart *v.* Butte County, 17 Cal. 23. Illinois, Guild *v.* Chicago, 82 Ill. 472. Iowa, Morford *v.* Unger, 8 Iowa, 82. New Jersey, Paterson *v.* Useful Manufacturers, etc., Soc., 24 N. J. L. 385. New York, Chenango Bank *v.* Brown, 26 N. Y. 467. Pennsylvania, Hoers *v.* Reading, 21 Pa. St. 188. Texas, Doblin *v.* San Antonio, 2 Tex. Unrep. Cas. 708. Washington, Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625.

In 8 Cyc. at page 842, the law is stated as follows: *"Creation of municipalities, amendment of charters, and changing boundaries.* The acceptance of a charter or the adoption of an amendment thereto may be submitted to the voters of a district."

The following cases are cited: California, In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 284. Georgia, Brunswick *v.* Finney, 54 Ga. 317. Iowa, Morford *v.* Unger, 8 Iowa 82. Kentucky, Clarke *v.* Rogers, 81 Ky. 43. Mass., Stone *v.* Charlestown, 114 Mass. 214. Missouri, 55 Mo. 295. Montana, People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346. New Jersey, Paterson *v.* Useful Manufacturers Soc., 24 N. J. L. 385. New York, Chenango Bank *v.* Brown, 26 N. Y. 467; Blauvelt *v.* Hyack, 9 Hun (N. Y.) 153. But see People *v.* Stout, 23 Barb. (N. Y.) 349, 4 Abb. Pr. (N. Y.) 22, 13 How. Pr. (N. Y.) 314. North

Carolina, Manly *v.* Raleigh, 57 N. C. 370. Penn., Smith *v.* McCarthy, 56 Pa. St. 359; Com. *v.* Judges Quarter Sess., 8 Pa. St. 391. Alabama, Exp. Hill, 40 Ala. 121. Arizona, Territory *v.* Mohave County (Ariz. 1887), 12 Pac. 730. California, Upham *v.* Sutter County, 8 Cal. 378. But see Dickey *v.* Hurlburt, 5 Cal. 343. Florida, Lake County *v.* State, 24 Fla. 263, 4 So. 795. Mississippi, Barnes *v.* Pike County, 51 Miss. 305. Penn., Com. *v.* Painter, 10 Pa. St. 214. Texas, Walker *v.* Tarrant County, 20 Tex. 16.

In 6 Am. & Eng. Encl. L. 1024, the above case of Chenango Bank *v.* Brown, 26 N. Y. 267 is cited with approval, and the law is stated as follows:

> "*General Incorporation Act.*—So a statute was upheld which authorized electors of an incorporated village to determine by what section of the general incorporation act it should be governed."

In Dillon on Municipal Corporations (4th Ed.) Vol. 1, Sec. 24, top of page 77, the law is stated thus:

> "But while the Legislature is not bound to obtain the acceptance or assent of the municipal corporation, it is well established that a provision in a municipal charter that it shall not take effect unless assented to or accepted by a majority of the inhabitants is not unconstitutional, it being in no just sense a delegation of legislative power, but merely a question as to the acceptance or rejection of a charter."

If it is not a delegation of legislative power to submit one charter, then it is equally true that there is no delegation of legislative power in submitting a hundred charters. If the hundred charters can be submitted in a hundred sections, then for the sake of brevity, the hundred charters can be submitted in one section, provided that the result of the vote necessarily brings the acceptance of one of the hundred forms submitted in the one section. A familiar illustration of this principle may be found in our own legislation by referring to the following local option decisions:

> "*Submission to Popular Vote.*—The act passed March 31, 1853, entitled 'An Act to establish the first magisterial district free school in the County of Accomack,' providing

that the law should not go into operation unless adopted by a vote of three-fifths of the people of the district, and delegating the power of levying taxes to defray district expenses to a board of commissioners of the district is not unconstitutional. Bull *v.* Read, 13 Grat. 78.

"Acts, Va. 1885-86, p. 258, which provides for submitting the question of liquor license to a popular vote, and forbids the sale of intoxicating liquors within any magisterial district voting against license, is not unconstitutional, as delegating legislative powers. It leaves to the popular vote merely whether, in any given locality, licenses shall be granted, and not whether the sale of liquors shall be lawful. Savage *v.* Commonwealth, 84 Va. 619, 5 S. E. 565."

In Rutter *v.* Sullivan, 26 W. Va. 427, it was held that:

"Act March 4, 1679, establishing the municpal court of Huntington, and providing that the operation of the act should be suspended until approved by the voters of that city, is not unconstitutional as a delegation of legislative power to the people, since the statute was already enacted when submitted to the people for approval."

See also the following decisions as sustaining this view: Eckerson *v.* City of Des Moines, 115 N. W. 177; Orrick *v.* City of Fort Worth, 114 S. W. 677; Chicago, etc., R. R. Co. *v.* Greer, 114 Am. St. Rep. 313, where authorities are collated and considered in an extensive note.

III

THE AUTHORITY IN THE AMENDMENT AUTHORIZING THE LEGISLATURE TO PRESCRIBE AN ELECTION GIVES THE LEGISLATURE THE RIGHT TO PRESCRIBE THE MANNER OF THE ELECTION, INCLUDING A SPECIFICATION OF WHAT MAY BE VOTED ON AND HOW IT MAY BE VOTED ON, WHEN TAKEN WITH THE AUTHORITY TO PRESCRIBE SUCH FORMS AS MAY BE DEEMED BEST.

When the Constitution gives to the Legislature the power to prescribe such forms as may be deemed best and adds to that the authority to hold an election to put into effect those forms, the authority of the Legislature is almost unlimited. The Legislature can either prescribe the details of the election or the

details of the forms, and what is not comprehended within a detail of the election would be included within the details of the forms. It is not contended that the unbounded authority to conduct the election is alone sufficient, but it is contended that this authority, together with the authority to prescribe any forms that might be deemed best, is strongly convincing as to the right of the Legislature to submit a number of forms and variations in forms to the people for their choice.

IV

THE ACT IS COMPLETE. THE CHOICE TO THE VOTERS BETWEEN FORMS AND VARIATIONS IN FORMS, CONSTITUTING COMPLETE FORMS, DOES NOT RENDER THE ACT INCOMPLETE.

It is on this point that the constitutionality of the Optional Charter Act rests most firmly. Our Supreme Court has decided in numerous cases that a complete act may be submitted to the people. It remains to define a complete act. The New York Court, in the above case of Bank of Chenango *v.* Brown, 26 New York, 467, has held that an act is complete when it allows the people to accept or reject a number of sections. The Optional Charter Act not only allows the people to accept or reject a number of sections, but also sub-section, *but the charter tendered in each case, when accepted or rejected, is a complete act.* The charter to be drawn and accepted or rejected by the people, under their petition, is as complete in all its forms as any other charter granted by the Legislature. The method of selecting the charter, namely, by petition, and the method of holding an election thereon, is fully covered by the authority in the amendment allowing the Legislature to prescribe such forms as it might deem best and giving the Legislature full authority in prescribing an election.

While a committee of the Norfolk Chamber of Commerce, composed of several leading lawyers of Norfolk, has pronounced the Optional Charter Act unconstitutional, and while the opinion of this committee is entitled to great weight, yet it is submitted with all due deference that this opinion is entirely contraverted by the reasoning and authorities above set forth.

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